

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVEL COMMUNICATIONS, INC., et al.,

Plaintiffs,

v.

QWEST CORPORATION,

Defendants.

No. C03-3680MJP

MINUTE ORDER REQUESTING
JOINT STATUS REPORT

The following Minute Order is made by direction of the Court, the Honorable Marsha J. Pechman, United States District Judge:

On January 29, 2007, this Court stayed the above action in its entirety pending the FCC's resolution of the threshold issue regarding the scope of the Waiver Order. (Dkt. No. 59.) In that order, the Court instructed that any party may move to lift the stay if the FCC failed to issue an order regarding the scope of the Waiver Order by January 29, 2008. The Court now instructs the parties to submit a joint status report offering information on the status of the FCC proceedings and on the parties' expectations for pursuing the action in this Court. The joint status report shall be submitted within 30 days of this order, by Wednesday, February 27, 2008.

The Clerk is directed to send copies of this order to all counsel of record.

Date: January 28, 2008.

BRUCE RIFKIN, Clerk
By /s/ Mary Duett
Deputy Clerk

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The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVEL COMMUNICATIONS, INC., et al.,

Plaintiffs,

v.

QWEST CORPORATION,

Defendant.

Case No. C03-3680P

JOINT STATUS REPORT RE FCC
REFERRAL AND RECOMMENDATION
TO RESUME JURISDICTION TO
CONSIDER MOTIONS

Davel Communications, Inc., *et al.* ("Davel") and Qwest Corporation ("Qwest") (collectively "the Parties") file this joint status report pursuant to the court's Minute Order of January 28, 2008:

1. The Ninth Circuit's opinion in this case concluded that the lawsuit presented a threshold issue which, pursuant to the doctrine of primary jurisdiction, required referral to the Federal Communications Commission ("FCC"). Pursuant to that direction, on September 11, 2006, Davel filed a Petition for Declaratory Ruling with the FCC in Docket CC 96-128 ("Davel Petition"). The Davel Petition sought the FCC's response to the referred issue, concerning the scope of the "refund" discussed in the "*Waiver Order*," *See In re*

1 Implementation of the Pay Telephone Reclassification and Compensation Provisions of the
2 Telecommunications Act of 1996, *Order*, DA 97-805, 12 F.C.C.R. 21, 370 (April 15, 1997).

3 2. The Parties can also report that there are the following other proceedings
4 pending at the FCC in Docket CC 96-128 that relate to the issue of the FCC's interpretation of
5 the *Waiver Order*:

- 6 • Illinois Public Telecommunications Association ("IPTA") petition
7 for a declaratory ruling (filed July 30, 2004);
- 8 • Southern Public Communication Association ("SPCA") petition for
9 declaratory ruling (filed November 9, 2004);
- 10 • Independent Payphone Association of New York ("IPANY") petition
11 for declaratory ruling (filed December 29, 2004);
- 12 • Oregon Public Utility Commission ("PUC") letter requesting FCC
13 guidance (filed November 23, 2005);
- 14 • Florida Public Telecommunications Association, Inc. ("FPTA")
15 petition for a declaratory ruling (filed January 31, 2006);
- 16 • Massachusetts Supreme Court referral requesting FCC guidance
(filed March 6, 2006);
- 17 • Payphone Association of Ohio ("PAO") petition for declaratory
18 ruling (filed December 28, 2006)

17 (collectively the "Other Petitions").

18 3. To date, the FCC has not formally acted upon the Davel Petition nor the
19 Other Petitions. However, Qwest is meeting with the FCC to discuss these issues on
20 Wednesday, February 27, 2008.

21 4. Presently, the Parties have no further information about what will happen at
22 the FCC meeting, what positions the FCC may take, or how any FCC actions may affect this
23 case. Nevertheless, given the uncertainty that this recent development creates, and the possibility
24 of guidance from the FCC, the parties request that the Court leave the stay in place for immediate
25 future.

1 5. Unless the court directs otherwise, the Parties will submit a further joint
2 status report to the Court, no later than March 7, 2008, regarding the results of Qwest's meeting
3 with the FCC.

4 Respectfully submitted this 27th day of February, 2008.

5
6
7 By: /s/ Douglas P. Lobel
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SEADOCS:316069.13

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVEL COMMUNICATIONS, INC., et
al.,

Plaintiffs,

v.

QWEST CORPORATION,

Defendant.

Case No. C03-3680P

JOINT STATUS REPORT RE FCC
REFERRAL

Davel Communications, Inc., et al. ("Davel") and Qwest Corporation ("Qwest")
(collectively "the Parties") file this joint status report as explained in the Parties' report on
February 27, 2008:

QWEST'S MEETING WITH THE FCC

1. Qwest, Davel, and other parties have periodically met with the FCC over
the last year or two regarding the PAL rate proceedings pending at the FCC (identified in the
parties' February 27 Joint Status Report as the "Davel Petition" and the "Other Petitions"). Most
recently, Qwest representatives met with FCC personnel on Wednesday, February 27, 2008. As
required by FCC rules, Qwest publicly filed a letter disclosing the meeting's participations and
purposes. A copy of that letter is attached hereto as Exhibit A.

JOINT STATUS REPORT RE FCC REFERRAL - 1
(C03-3680P)

SEADOCS:321152.1

MILLER NASH LLP
ATTORNEYS AT LAW
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ATTACHMENT C

1 2. At the meeting, the FCC did not state when or if it intends to release any
2 orders relating to the Davel Petition or the Other Petitions. Consequently, Qwest cannot predict
3 when or whether the FCC will act on the Davel Petition or Other Proceedings. Qwest has no
4 information that any ruling is imminent in three months or any time. Qwest contends that
5 regardless of when or whether the FCC acts, there are threshold legal issues regarding the case
6 that the Court can and should decide at this time. Accordingly, because the case has been stayed
7 well over a year and has been pending since late 2003, Qwest requests that the Court lift the stay
8 to a limited extent for the actions outlined below.

9 3. On March 5, 2008, Davel spoke with FCC Wireline Bureau Chief Dana
10 Shaffer, one of the people with whom Qwest met on February 27th. A copy of Davel's required
11 public disclosure letter is attached as Exhibit B. Public FCC filings also reveal that within a
12 week of the FCC's meetings with Qwest, the FCC also met with AT&T and Verizon on the Other
13 Proceedings. Attached as Exhibits C and D are the AT&T and Verizon disclosure letters.

14 4. While Davel also cannot predict when or whether the FCC will act, Davel
15 notes that the highest levels of the FCC appear to be engaged in the proceedings, including Ian
16 Dillner, of the FCC Chairman's office; Dana Shaffer, FCC Wireline Competition Bureau Chief;
17 and Matthew Berry, the FCC's General Counsel, as reflected by the attached Exhibits. Thus,
18 Davel believes the Court should maintain the stay for an additional three months, to allow the
19 FCC to rule. Qwest believes no information exists indicating that a ruling will be forthcoming
20 on any timetables.

21 DAVEL'S "INDEPENDENT CLAIMS"

22 5. As the Court is aware from briefing about a year ago, Davel asserts that it
23 has "independent" claims arising under Section 276 and other provisions of the Communications
24 Act, for damages relating to Qwest's PAL rate overcharges. Davel alleges these claims do not
25
26

1 depend on the *Waiver Order* or the FCC's interpretation of the *Waiver Order*.¹ Davel and Qwest
2 disagree as to whether these independent claims were a part of the case from the outset (as Davel
3 asserts) or were abandoned if in fact were in the case originally (as Qwest asserts).

4 6. Davel believes that these independent claims have already been properly
5 pleaded in its amended complaint. However, Davel also believes that, with the subsequent
6 passage of time and certain legal developments, some modifications to the Complaint are in
7 order.

8 7. Qwest, which has not yet seen any proposed modifications to the
9 Complaint, disputes that Davel has properly raised or pursued any claims independent of the
10 *Waiver Order*. Based on Davel's preliminary description of its "independent claims," Qwest also
11 believes any such claims, if they were pled, would be subject to dismissal.

12 8. While the Parties disagree on whether to lift the stay now, they agree that
13 the issues surrounding these "independent claims" are best addressed in briefing to the Court.
14 The Parties agree that if the stay is lifted the Court should permit Davel to file a Motion for
15 Leave to File a Second Amended Complaint, in which Davel would present the amendments it
16 proposes, and would also state the legal case for its amendments. Qwest would then have an
17 opportunity to review the amendments and, if Qwest believes it warranted, oppose the motion. If
18 the motion is granted, Qwest would then respond to the amended claims with whatever pleading
19 or motions are appropriate.

20 INTERPRETATION OF THE WAIVER ORDER

21 9. Because the FCC has not acted on Davel's Petition within the time set by
22 this Court and because Qwest has no information as to whether or when the FCC will act, Qwest
23 believes it is prudent for the Court to determine the meaning of the *Waiver Order*.

24 _____
25 ¹ Davel also has alleged claims arising out of Qwest's alleged overcharging for "fraud protection" rates. These
26 fraud protection claims do not arise out of or relate to the FCC's interpretation of the *Waiver Order*. The Parties
agree that fraud protection claims also arise under §§ 201(b), 276 and other sections of the Act, but are distinct from
the "independent" claims based on Qwest's PAL services.

1 10. Davel believes that the Court may ultimately be forced to rule on the
2 scope of the *Waiver Order* if the FCC fails to rule, but believes the court should wait another
3 three months and that discovery will be necessary before the Court can properly rule on the
4 scope of the *Waiver Order*. Among other issues, Davel believes that discovery regarding
5 Qwest's participation in the "RBOC Coalition" that initially requested the *Waiver Order*,
6 including its submissions to the FCC relating to the *Waiver Order*, as well as discovery regarding
7 Qwest's internal documents at and around the time of that request and the subsequent to the
8 waiver, will shed light on the proper interpretation of the *Waiver Order*.

9 11. Qwest believes discovery is unnecessary for the Court to determine the
10 meaning of the *Waiver Order*. Qwest believes it is entirely inappropriate for the meaning of a
11 federal agency's order to be interpreted based on information held by private persons. The Court
12 is competent to determine the plain meaning of the FCC's order based on the words of the order,
13 and discovery on Qwest cannot affect the meaning of that order. If the Court rules in Davel's
14 favor, it is possible that at some point facts unique to Qwest might determine the extent to which
15 the order affects Qwest – but those facts legally cannot affect the meaning of the order itself.

16 12. While the Parties disagree on the timing of Court's withdrawal of the
17 referral, the parties agree that the referred issue – interpretation of the *Waiver Order* – may
18 ultimately have to be decided by the Court if the FCC has not acted. If so, then the Court should
19 interpret the words in the *Waiver Order* and apply it to the facts in this case.²

20 13. Qwest believes this issue is parallel to Davel's "independent claims"; *i.e.*,
21 if the Court rules in Qwest's favor regarding the interpretation of the *Waiver Order*, then the
22 Court might deem the "independent" claims" to be moot. Therefore, Qwest requests that the
23 Court permit Qwest to file a motion to dismiss Davel's claims under the *Waiver Order* based on
24 the meaning of that order, to be heard in conjunction with Davel's motion to amend.

25 _____
26 ² As to any fact issues, Davel is entitled to trial by jury, as was properly and timely demanded, unless those issues
can be resolved pursuant to Rule 12 or Rule 56.

1 14. Davel believes its claims are truly independent of the *Waiver Order*, and
2 so will not be affected at all by any interpretation of the *Waiver Order*. Moreover, Davel also
3 believes discovery will be necessary to interpret the *Waiver Order*. For that reason, Davel
4 believes if the stay is lifted that the Court should first rule on its motion to amend, and only after
5 that ruling, rulings on the issue below and further discovery, should the parties be allowed to file
6 any potentially dispositive motions. Davel also believes that, before the Court decides to
7 withdraw the referral and decide the issue of the *Waiver Order* itself, it should give notice to the
8 FCC of its intent to do so in order to give the FCC one last chance to act.³

9 15. If the Court determines that it will determine the scope of the *Waiver*
10 *Order* itself, the parties agree that the issue should be decided by motion. However, the parties
11 disagree as to the appropriate procedure. Because Qwest believes the issue is one purely of law,
12 Qwest submits the issue is properly resolved by a motion or cross-motions under Rule 12. Davel
13 believes it would like to submit evidence and thus submits the issue is properly resolved by a
14 motion or cross-motions for partial summary judgment under Rule 56.

15 REFERRALS TO THE STATE COMMISSIONS

16 16. Qwest also believes that the Court will have to decide whether to refer the
17 merits of Davel's arguments regarding NST-compliance to the eleven State public utility/service
18 commissions ("State Commissions"). Davel opposes referral to any State Commissions as futile,
19 inappropriate and unnecessary.

20 17. Qwest believes that the issue of whether any portion of this case needs to
21 be referred to state commissions should only be decided after the Court rules on the scope of the
22 *Waiver Order* and Davel's request to amend the complaint to add "independent claims," because
23 a ruling in Qwest's favor on both of these issues will moot the need to refer issues to the states.

24
25 ³ If the Court were to permit and rule on dispositive motions and the FCC rules at some point on the Davel Petition,
26 the Parties agree the Court always has the authority to reconsider its interlocutory ruling on the interpretation of the *Waiver Order*.

18. Davel believes that the issue of whether any portion of this case should be referred to state commissions will have to be decided regardless of how or whether the Court rules on the scope of the *Waiver Order*, as Davel's Independent Claims do not depend on the *Waiver Order*. Davel believes that the issue of whether or not to refer an portion of this case to state commissions can and should be decided by this Court before it considers any motion to interpret the *Waiver Order*,⁴ but discovery will also be needed before consideration of this motion as well.

CONCLUSION

19. Qwest believes that the Court should lift the stay for purposes of the limited procedures described above. If the stay is lifted, the Parties are not in agreement as to the order of these motions and whether discovery is appropriate. Davel requests that if the stay is lifted, its motion to amend its Complaint to add "independent claims" should be heard first, and afterward the Court can determine if any additional motions are necessary and also determine if Davel can take discovery on Qwest. Qwest requests that the Court hear both Davel's motion to amend and Qwest's Rule 12 motion on the scope of the *Waiver Order* (and Davel's Rule 56 motion, if such motions are allowed) simultaneously, without discovery, and afterward the Court may then need to hear Qwest's motion to refer issues to State Commissions. Summarizing the issues the Parties therefore request that if the stay is lifted the Court should determine:

(a) Whether the Court will decide the referred issue itself (lacking any response from the FCC), meaning, deciding the "scope" of the *Waiver Order* – and, if so, whether to permit Qwest to file a Rule 12 motion to that effect, or to permit the parties to file simultaneous cross-motions under Rule 12;

⁴ Davel believes that since referral to any state commissions would mean more delay in considering the merits, it makes sense to dispose of that issue now so that the parties will have a clear roadmap for litigation if and when the FCC rules.

(b) Or whether the Court would permit Davel to take discovery on Qwest prior to briefing of that issue, and then allow the parties to file simultaneous cross-motions under Rule 56;

(c) Whether to permit Davel to move to amend its complaint to add "independent" claims;

(d) If the Court interprets the *Waiver Order* in the broad manner Davel has proposed or if Davel has "independent claims," whether to permit Qwest to move to refer the merits of Davel's claims to State Commissions; and

(e) What schedule or order of proceedings to allow these threshold activities.

20. The Parties propose that, should the Court determine to lift the stay so that all or some of these motions can be filed and considered, the Parties will cooperate in setting a timely briefing schedule. If the Court needs oral argument, the Parties will not be opposed to having argument on all or some of the motions simultaneously.

21. Qwest requests that the Court lift the stay for the limited purposes of considering the issues raised above. Davel requests that the Court continue the stay for three months and order an ADR procedure.

22. If the Court determines to lift the stay, the Court should also incorporate the process agreed to and suggested above in its Order on Joint Status Report.

DATED this 10th day of March, 2008.

By: /s/ Douglas P. Lobel
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David Vogel, *Pro Hac Vice*
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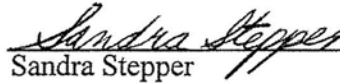
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1 I hereby certify that on this 10th day of March, 2008, I electronically filed the
2 foregoing JOINT STATUS REPORT RE FCC REFERRAL with the Clerk of the Court using the
3 CM/ECF system which will send notification of such filing to:

4 Douglas Lobel, *Pro Hac Vice*
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14 Attorneys for Defendants

15 Dated this 10th day of March, 2008.

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Sandra Stepper
Legal Secretary

Certificate of Service - 1

Melissa E. Newman
Vice President – Federal Regulatory
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EX PARTE

Electronic Filing via ECFS

February 27, 2008

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *In the Matter of Payphone Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996* - CC Docket No. 96-128

Dear Ms. Dortch:

On February 27, 2008, Craig Brown, Steven Young and Melissa Newman, all of Qwest, met with Dana Shaffer, Chief-Wireline Competition Bureau, and Matthew Berry, General Counsel, to discuss the petitions for declaratory ruling filed in the above-captioned proceeding.

All of the issues discussed in the meeting were consistent with Qwest's position on the record in this docket.

This ex parte is being filed electronically pursuant to 47 C.F.R. §§ 1.49(f) and 1.1206(b).

Sincerely,

/s/ Melissa Newman

Copy via email to:
Dana Shaffer
Matthew Berry

EXHIBIT A



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March 6, 2008

ELECTRONIC FILING VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
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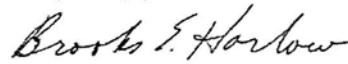
Subject: In the Matter of Payphone Telephone Reclassification and Compensation
Provisions of the Telecommunications Act of 1996 - CC Docket No. 96-128

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, we hereby provide you with notice of an oral ex-parte communication on March 5, 2008, with Dana Shaffer, Wireline Bureau Chief, to discuss the petitions for declaratory ruling filed in connection with the above-referenced matter. The undersigned appeared on behalf of the plaintiffs/appellants in *Davel Communications, et al. v. Qwest*, Ninth Circuit Case No. 04-35677 ("*Davel case*"). The plaintiffs in the *Davel case* filed a petition for declaratory ruling in this docket on September 11, 2006 ("*Petition*").¹

All issues discussed were consistent with Davel's position on the record in this docket.

Very truly yours,


Brooks E. Harlow, P.C.

cc: Ms. Dana Shaffer (via e-mail)

¹ A complete listing of the clients in the *Davel case* is attached to the Petition.



I. Celia Nogales
Executive Director
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February 21, 2008

VIA ELECTRONIC SUBMISSION

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, N.W.
Suite 1100
Washington, D.C. 20554

**Re: *Notice of Ex Parte – Pay Telephone Reclassification and
Compensation Provisions of the Telecommunications Act of 1996,
CC Docket 96-128***

Dear Ms. Dortch:

On February 21, 2008, Robert Quinn, Senior Vice President, Davida Grant, Senior Counsel and the undersigned, representing AT&T, met with Dana Schaffer, Bureau Chief of the Wireline Competition Bureau, Ian Dillner, Legal Advisor, to Commissioner Kevin Martin and Matthew Berry, General Counsel, to discuss AT&T's position already on file regarding the petitions for declaratory ruling and preemption filed in the above-captioned docket.

In accordance with Section 1.1206(b)(2) of the Commission's Rules, this letter is being filed electronically with your office. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Celia Nogales".

cc: Dana Schaffer
Ian Dillner
Matthew Berry

EXHIBIT c



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Associate Director
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February 26, 2008

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: In the Matter of the Pay Telephone Reclassification and Compensation
Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128**

Dear Ms. Dortch:

Today, Susanne Guyer, Karen Zacharia and Maggie McCready of Verizon and Aaron Panner of Kellogg Huber Hansen Todd Evans & Figel met with Dana Shaffer, Chief of the Wireline Competition Bureau, Ian Dillner, Legal Advisor to Commissioner Martin, and Matthew Berry, General Counsel, to discuss the petitions for declaratory ruling and preemption filed in the above-captioned proceeding. All issues discussed were consistent with Verizon's position on the record. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann D. Berkowitz".

cc: Ian Dillner
Dana Shaffer
Matthew Berry

EXHIBIT D

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVEL COMMUNICATIONS, INC., et al.,

Plaintiffs,

v.

QWEST CORPORATION,

Defendant.

Case No. C03-3680P

LOCAL RULE 16(b)
RECOMMENDATION OF DAVEL FOR
ADR PROCEEDINGS

Pursuant to Local Rule 16(b) the undersigned counsel for Davel Communications, Inc., *et al.* ("Davel") reports that it has concluded that an ADR procedure would have a significant possibility of fostering an early and inexpensive resolution of this case. The undersigned has so advised counsel for Qwest.

Davel believes that the case is most likely to settle early with a judicial settlement conference under Local Rule 39.1(e) and respectfully requests that Judge Barbara Rothstein be appointed as a settlement judge. The undersigned has spoken with Judge Rothstein's law clerk and understands that Judge Rothstein may be interested in conducting a settlement conference but has not yet confirmed her availability.

1
2 Respectfully submitted this 14th day of March, 2008.
3

4 By: /s/ Brooks Harlow
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